APPEAL NO. 032173
FILED OCTOBER 9, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on July 15, 2003. The hearing officer resolved the disputed issue by deciding that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the ninth quarter. The appellant (self-insured) appealed, arguing that the great weight of evidence is contrary to the hearing officer's decision. The claimant responded, urging affirmance.

DECISION

Reversed and rendered and Finding of Fact No. 1.D. is reformed.

Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102) set out the statutory and administrative rule requirements for SIBs. At issue in this case is whether the claimant met the good faith job search requirement of Section 408.142(a)(4) by showing that she had a total inability to work during the relevant qualifying period. Rule 130.102(d)(4) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work.

The record reflects that the parties stipulated that the claimant's impairment rating was 38%. Finding of Fact No. 1.D. is reformed to correct the typographical error to reflect the correct impairment rating. Further, the parties stipulated that the ninth quarter of SIBs was from May 16 through August 14, 2003; that the qualifying period for the ninth quarter was from February 2 through May 3, 2003; that the claimant did not elect to commute any portion of her impairment income benefits; and that Dr. W is the Texas Worker's Compensation Commission (Commission) appointed designated doctor under Section 408.151. The hearing officer's finding that Dr. W's medical report dated April 30, 2003, was not received by the Commission until after the expiration of the qualifying period for the ninth quarter was undisputed. Pursuant to Rule 130.110, the designated doctor's report is afforded presumptive weight from the time that the Commission receives the report. Therefore, while Dr. W's report can be considered as evidence, it is not entitled to presumptive weight in this case.

The hearing officer found that Dr. W "provided a narrative report explaining that the claimant cannot work at any job in any capacity because of the combination of her impairment from the compensable injury and her other health problems" and that there are no other records showing that the claimant was able to return to work during the qualifying period for the ninth quarter. The claimant testified at the CCH, and the

medical records reflect, she has heart disease, high blood pressure, diabetes, and osteoporosis, as well as other medical conditions. It was undisputed that the claimant suffered from numerous health conditions prior to the compensable injury. Dr. W discussed the claimant's various health conditions in her report and concluded that there is no evidence that the claimant's diabetes or any other of her noncompensable problems were accelerated by the work-related fall, and in all probability any acceleration of the disease process is part of the natural history of the disease itself. The claimant contended at the CCH that her compensable injury has caused her to fall resulting in a broken left shoulder and broken nose as well as causing her diabetic condition to deteriorate adversely affecting her eyesight and requiring her to take insulin. It was undisputed that the claimant's compensable injury was to her left knee and right shoulder. The self-insured argues that the Commission rules require that to establish entitlement to SIBs, the conditions that would prevent the claimant from working must entirely result from the compensable injury. The self-insured correctly notes that no medical evidence was presented at the CCH to show that the claimant's various other medical conditions worsened as a result of her compensable injury.

The hearing officer's finding that Dr. W provided a narrative report explaining that the claimant cannot work at any job in any capacity because of the combination of her impairment from the compensable injury and her other health problems is in error. The hearing officer employed the wrong standard. The rule requires that the narrative explain how the compensable injury causes a total inability to work. Dr. W noted in her report that the claimant underwent a functional capacity evaluation in April of 2001, which concluded the claimant safely qualified for a sedentary physical demand level. Although Dr. W acknowledged in her report that considering the sum total of the claimant's medical problems, the claimant will never be able to return to work, Dr. W concluded that, if only the left knee and right shoulder are considered, the claimant could work at least in a sedentary physical demand level position. Dr. W's report stated "just considering the compensable factors, [the claimant's] compensable medical condition has remained stable enough to sufficiently allow her to return to work." Texas Workers' Compensation Commission Appeal No. 000835, decided June 5, 2000, cited the preamble to Rule 130.102(d)(3) (the no-ability-to-work provision effective January 31, 1999, that was renumbered as Rule 130.102(d)(4) effective November 28, 1999), which noted that the good faith, no-ability-to-work provision should be a limited situation and only applies where it is clear that the injured employee cannot return to work because of the compensable injury.

We need not reach the determination of whether the narrative report from the treating doctor, the only other medical evidence in the record, was a narrative which specifically explains how the injury causes a total inability to work because the report of Dr. W is another record which shows that the injured employee is able to return to work. In cases where a total inability to work is asserted and there are other records which on their face appear to show an ability to work, the hearing officer is not at liberty to simply reject those records as not credible without explanation or support in the record. Texas Workers' Compensation Commission Appeal No. 002498, decided November 30, 2000. In this case, all the hearing officer does is recite "there are no other records showing

that claimant is able to return to work during the qualifying period for the ninth quarter" without any explanation why Dr. W's report is not a record which shows that the claimant is able to do sedentary work when considering her compensable injury; thus, the hearing officer erred in determining that the claimant is entitled to SIBs for the ninth quarter.

In her response, the claimant argues that she is in the same situation as she was in during the fifth quarter, referencing the decision in Texas Workers' Compensation Commission Appeal No. 022544, decided November 12, 2002. In Appeal No. 022544, the Appeals Panel reversed a determination that the claimant was not entitled to SIBs and rendered a decision that she was entitled to SIBs for that quarter. We note that the evidence in this case is different from the evidence in the record for the fifth quarter. In Appeal No. 022544 it was determined that the report of the required medical examination doctor dated April 24, 2002 "[made] clear how the compensable injury caused a total inability to work." The report referenced in Appeal No. 022544 was not in the record in the instant case.

The hearing officer's decision that the claimant is entitled to SIBs for the ninth quarter is reversed and a new decision is rendered that the claimant is not entitled to SIBs for the ninth quarter.

According to information provided by the self-insured, the true corporate name of the insurance carrier is **(a self-insured governmental entity with RCH Protect Cooperative as its third party administrator)** and the name and address of its registered agent for service of process is

KR
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

DISSENTING OPINION:

With the deepest respect for my colleagues in the majority, I am constrained to dissent. I agree with the majority that the rules require that the inability to work be caused by the compensable injury, but I do not think that the rules provide that the compensable injury be the sole cause of the inability to work. If the compensable injury, in combination with other conditions, renders the claimant unable to work then I think the compensable injury is still a cause of the claimant's inability to work. It appears to me that is how the hearing officer in the present case interpreted the report of the designated doctor, and I think that such an interpretation is both reasonable and within the hearing officer's purview as the finder of fact. I also believe that it is consistent with Rule 130.102(d)(4).

To interpret the rule to mean that the compensable injury in isolation must be the sole cause of an inability to work would render the rule less than rational in my view. First, it is axiomatic that the same injury may have a different effect on the ability to work of different individuals. Second, and more significantly, the present case illustrates how such a requirement would lead to results that simply do not appear to make any sense. It seems fairly clear that this claimant will never be able to work again, at least the designated doctor clearly states that is her opinion and the other medical evidence is consistent with that. If the claimant cannot qualify for SIBs based upon her inability to work, the only remaining ways she could qualify for SIBs would be to seek employment, even though she could not perform any employment she obtained, or to seek retraining for employment she could not perform. What is more likely is that the costs of her support will be shifted from the self-insured, which undertook the responsibility for paying benefits for the effects of her injury, to the federal or local taxpayers.[1] This will happen in a case where it has been determined that the claimant had a 38% impairment rating as a result of her compensable injury and was working with her serious preexisting health conditions prior to the compensable injury. I simply find it difficult to believe that the rule was intended to require this result.

I would affirm the decision and order of the hearing officer.

_____
Gary L. Kilgore
Appeals Judge

[1] In the same fact scenario where there is a private workers' compensation carrier, these costs will be shifted away from a carrier that accepted premium dollars to take the responsibility for providing benefits for the effects of the compensable injury.